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No. 89-1322

In The
Supreme Court of the United States
October Term, 1989

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

THE CITIZEN BAND POTAWATOMI INDIAN
TRIBE OF OKLAHOMA,

Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The
Tenth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT

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September, 1990

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QUESTION PRESENTED

Respondent will address the following question:

Whether this Court should summarily reverse and remand this case to the Circuit Court for consideration of what measures the Petitioner might lawfully take to enforce its tax laws because the Respondent or a third party might later rely on the judgment below to seek broader relief than that actually granted.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
DISCUSSION.....	1
PROPOSITION	
A DESIRE FOR ANSWERS TO HYPOTHETICAL QUESTIONS IS NOT A PROPER REASON TO GRANT CERTIORARI FOR THE PURPOSE OF SUMMARILY REVERSING AND REMANDING ..	6
CONCLUSION	9

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Benton v. Maryland</i> , 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).....	8
<i>Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Com'n</i> , 888 F.2d 1303, 14 Fed.R.Serv.3d 1491 (10th Cir. Okl. 1989).....	2
<i>Liner v. Jafco, Inc.</i> , 375 U.S. 301, 84 S.Ct. 391, 11 L.Ed.2d 347 (1964).....	8
<i>Miller Bros. Co. v. State of Maryland</i> , 347 U.S. 340, 74 S.Ct. 535, 98 L.Ed. 744 (1954).....	5
<i>Montana v. Blackfeet Tribe</i> , 471 U.S. 759 (1985).....	6, 7
<i>Securities & Exchange Commission v. Medical Com- mittee for Human Rights</i> , 404 U.S. 403, 92 S.Ct. 577 (1972).....	8
<i>Standard Oil Co. v. People</i> , 291 U.S. 242, 54 S.Ct. 381, 78 L.Ed. 775 (1934)	5
<i>Washington v. Confederated Tribes of Colville</i> , 447 U.S. 134 (1980)	5

Consistent with Sup. Ct. R. 15.7, respondent, The Citizen Band Potawatomi Indian Tribe of Oklahoma ("Tribe"), submits the following supplemental brief because of an intervening matter not available at the time of respondent's last filing, to-wit: the "Brief for the United States As Amicus Curiae" (hereafter "Solicitor's Brief").

DISCUSSION

The Solicitor begins his brief by claiming that this "case has a confused procedural history, and it is not clear precisely what relief the Tribe requested and the Court of Appeals and District Court granted".¹ This sentence is not accurate and from it flows a flawed recommendation by the Solicitor.

As subsequently pointed out in the Solicitor's brief,² the precise relief sought by the Tribe was a judgment that permanently "enjoins . . . [petitioner (Oklahoma Tax Commission)] from entering plaintiff's Indian Country and from enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against plaintiff".³

¹ Solicitor's Brief, *supra* p. 7.

² *Id.* at 15, fn. 14.

³ See Brief in Opposition to Petition for Writ of Certiorari (hereafter "Opposition Brief"), p. A-7 (Mar. 22, 1990) (complaint for injunctive relief).

The relief granted by the Tenth Circuit is equally clear and precise: "REVERSED and REMANDED for dismissal of Oklahoma's counterclaim and entry of an injunction as prayed for by the Potawatomis". *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Com'n*, 888 F.2d 1303, 1307, 14 Fed.R.Serv.3d 1491 (10th Cir. Okl. 1989).

Finally, the permanent relief granted⁴ by the district court is likewise clear and precise, to-wit: Oklahoma is permanently enjoined "from entering the Tribe's Indian Country and from enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against the Tribe".⁵

Whatever may be confusing about the "procedural history" of this case it is not because the Tribe has been

⁴ The judgment also dismissed the counterclaim and permanently enjoined Oklahoma "from assessing the state sales taxes against and/or collecting any state sales taxes from plaintiff". The question of state "sales taxes" was never raised by the Potawatomis other than to point out that Oklahoma exempts the Potawatomis from paying sales taxes. See e.g. Opposition Brief, supra p. D-8, ¶10. The question of taxing sales by the Potawatomis was raised by Oklahoma's counterclaim. See Opposition Brief, supra p. B-6, ¶E.3. This sentence about sales taxes in the permanent injunction is a verbatim repetition of a sentence in the original judgment which was added, sua sponte, by the district court. See Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, p. A-10 (hereafter "Petition") (Feb. 20, 1990). No party appealed from this portion of the judgment (i.e. claimed that it was error) and thus it was simply repeated when the permanent injunction was entered after remand with no objection from Oklahoma.

⁵ Opposition Brief, supra p. D-10 (emphasis added).

imprecise in the relief it sought nor because of any ambiguity in the permanent relief granted by the district or appellate courts. Any "confusion" is the result of a counterclaim wrongly pursued by Oklahoma.⁶ Through this counterclaim, Oklahoma sought all kinds of affirmative relief against the Tribe including an order declaring that Oklahoma has jurisdiction to tax Potawatomi sales.⁷

To avoid potential pitfalls from this alleged "confused procedural history", the Solicitor suggests that "it [is] best to focus on the two principal legal issues the Court of Appeals actually decided."⁸ First, the Solicitor rightly concludes that the Tenth Circuit was correct in remanding for dismissal of Oklahoma's counterclaim and that such a dismissal is consistent with all decisions by circuit courts and by this Court.⁹ The dismissal of the counterclaim was certainly one of the principal issues decided by the Tenth Circuit. The second issue

⁶ For example, the district court apparently felt compelled by its consideration of the counterclaim to enter a judgment that is replete with references to "sales taxes" including an order "(3) that the plaintiff's [Potawatomis'] request for further permanent injunctive relief as to collection of state sales taxes on purchases by non-members of the Citizen Band Potawatomi Indian Tribe of Oklahoma at the Potawatomi Tribal Store, a/k/a The Gallery Trading Post is DENIED." Petition, supra p. A-10. The Potawatomis never asked for such injunctive relief and never discussed collection of state sales taxes on purchases by non-members of the Tribe. These were issues wholly raised by Oklahoma in its counterclaim.

⁷ See Opposition Brief, supra p. B-6. All of this affirmative relief was hypothetical because the only actual dispute was Oklahoma's proposed tax assessment.

⁸ Id. at 7.

⁹ Solicitor's Brief, supra pp. 7-13.

discussed by the Solicitor, however, was not. The Solicitor argues that the Tenth Circuit held "that the Tribe is entitled to **seemingly** broad injunctive relief barring the Commission from collecting state sales taxes on any of its sales of cigarettes, whether to Indians or non-Indians."¹⁰ The Solicitor has wisely used the equivocating adverb "seemingly" because the injunction actually entered, as the Solicitor points out, "does not in terms enjoin future collection of taxes on purchases by non-members where the Commission does not resort to such measures against the Tribe".¹¹ The Solicitor ignores the central issue, indeed, *the only issue, i.e.,* whether or not Oklahoma can assess an Indian tribe with a cigarette tax.¹²

¹⁰ Id. (emphasis added).

¹¹ Solicitor's Brief, supra p. 15, fn. 14.

¹² Although the Solicitor never provides any direct authority for the proposition that Oklahoma can assess a tax against an Indian tribe, he does provide some non-syllogistic reasoning from which one is supposed to infer such authority. For example, the Solicitor argues that: "Because the State's authority to tax cigarette purchases by non-members in *Moe*, *Colville* and *Chemehuevi* was not acquired pursuant to – but rather existed independently of – Public Law 280, it follows that Oklahoma's power to tax cigarette purchases by non-members at the Tribe's store likewise exists independently of Public Law 280 and that Oklahoma's failure to acquire civil jurisdiction under Public Law 280 therefore does not foreclose it from exercising that power." Solicitor's Brief, supra p. 17. Again, the Solicitor is begging the question. Where is Oklahoma's authority in Indian Country – or, for that matter, the authority for the states in *Moe*, *Colville* and *Chemehuevi* – which exists independently of Public Law 280? To date, no party has supplied any answer. Public Law 280 may or may not be the jurisdictional basis for the decisions in *Moe*, *Colville* and *Chemehuevi*,

(Continued on following page)

The Solicitor's brief studiously avoids providing any argument or authority for the proposition that Oklahoma was correct in assessing the Tribe with a tax.¹³ In fact, the Solicitor overlooks considerable authority to the contrary. See e.g. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 94 L.Ed.2d 244, 258, fn. 17, 108 S.Ct. 1083 (1987). Instead, the Solicitor discusses an issue (the impact of the *Colville* decision¹⁴ in Oklahoma) which is not relevant because the counterclaim cannot be pursued.¹⁵ The merits of Oklahoma's counterclaim should not be discussed in this petition for writ of certiorari. The merits of the counterclaim are not at issue. What is at issue is whether or not the counterclaim was properly dismissed. If so, the merits of the counterclaim are moot. If, contrary to all

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but some jurisdictional basis must exist because the power to tax extends only as far as the jurisdiction of the tax assessor. *Miller Bros. Co. v. State of Maryland*, 347 U.S. 340, 342, 74 S.Ct. 535, 98 L.Ed. 744 (1954); *Standard Oil Co. v. People*, 291 U.S. 242, 244-45, 54 S.Ct. 381, 78 L.Ed. 775 (1934).

¹³ The Solicitor refers to the cigarette tax issue here as a "tax on purchases". Solicitor's Brief, supra p. 15. This reference is not accurate. The proposed tax assessment is not on "purchases", but rather on the Potawatomis. Further, the three cases relied upon by the Solicitor concerned a "tax on purchasers", not a "tax on purchases". See e.g. *California v. Chemehuevi Indian Tribe*, 106 S.Ct. 289, 290 (1985). None of these cases upheld the direct assessment of a tax against an Indian tribe.

¹⁴ *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980).

¹⁵ Oklahoma's counterclaim is premised on the *Colville* decision. See Opposition Brief, supra p. B-5 ("That said actions of the plaintiff [Tribe] are in violation of . . . the federal common law as set forth in . . . *Washington v. Confederated Tribes of Colville*.").

existing authority,¹⁶ the counterclaim should not have been dismissed, the appropriate relief would not be to reverse the injunction but rather to remand this case to the Tenth Circuit for consideration of the merits of the counterclaim. In agreeing that the counterclaim was properly dismissed but arguing that the merits of the counterclaim require reversal, the Solicitor is taking positions which are irreconcilable.

PROPOSITION

A DESIRE FOR ANSWERS TO HYPOTHETICAL QUESTIONS IS NOT A PROPER REASON TO GRANT CERTIORARI FOR THE PURPOSE OF SUMMARILY REVERSING AND REMANDING.

In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indian's exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear.

Montana v. Blackfeet Tribe, 471 U.S. 759, 765 (1985) (emphasis added). Although the Solicitor – like Oklahoma – does not cite a single authority for the proposition that Oklahoma can lawfully assess a cigarette tax against the Tribe, this lack of authority does not deter the Solicitor from urging this Court to summarily reverse on issues which have not been briefed by the Tribe. The

¹⁶ Sovereign suit immunity is not the only reason why the counterclaim was properly dismissed. See e.g. Opposition Brief, *supra* pp. 7-8.

Solicitor foresees that the Tenth Circuit opinion might later be misconstrued or might lead to some future errors. The Solicitor's argument for reversal is capsulized in the following quotations:

[I]f the Court of Appeals judgment is permitted to stand, the Tribe **might** rely on that judgment in seeking broader relief **in this or some other case**.

Solicitor's Brief, *supra* p. 15, fn. 14 (emphasis added).

If the Court disposes of the petition in the manner we suggest, it will furnish an opportunity for the Court of Appeals to clarify what other issues were presented and preserved below. Moreover, because the Court of Appeals held that all transactions at the Tribe's stores are exempt from state taxation, it had no occasion to consider what measures the Commission might lawfully take to enforce its tax laws if those laws *do* apply to at least some sales of cigarettes (those to non-members). Nor is it clear what enforcement measures the state would propose to take. The Court of Appeals should be given an opportunity to address these matters in the first instance.

Id. at 17 (emphasis in original). This is clearly a call for a remand to the Tenth Circuit solely for the purpose of soliciting a series of advisory opinions. The Court of Appeals "had no occasion to consider what measures the Commission [Oklahoma] might lawfully take to enforce its tax laws", not because the Court of Appeals held that "all transactions at the Tribe's stores are exempt from state taxation", but because – once the counterclaim was dismissed – the only issue before the Tenth Circuit was whether or not the measure actually taken by Oklahoma (tax assessment) was lawful. It may not be clear "what

enforcement measures the State would propose to take" but it is clear what measure Oklahoma actually did take (assess the Tribe with a cigarette tax) and that this measure is patently illegal. *Montana, supra* p. 765.

The Solicitor is asking this Court to take action contrary to the U.S. Constitution which prohibits the exercise of jurisdiction by federal courts except for actual controversies.

'[I]t is well settled that federal courts may act only in the context of a judiciable case or controversy.' *Benton v. Maryland*, 395 U.S. 784, 788, 89 S.Ct. 2056, 2059, 23 L.Ed.2d 707 (1969). 'Our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.' *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n. 3, 84 S.Ct. 391, 394, 11 L.Ed.2d 347 (1964).

Securities & Exchange Commission v. Medical Committee for Human Rights, 404 U.S. 403, 407, 92 S.Ct. 577, 579-80 (1972). A petition for writ of certiorari should be granted "only when there are special and important reasons therefor". Sup. Ct. R. 17.1. The Solicitor's call for summary reversal and remand is premised on a desire for the Tenth Circuit to resolve numerous hypothetical questions. This is not a "special" or "important" reason for granting certiorari and is contrary to the constitutional grant of jurisdiction to the federal courts.

CONCLUSION

The petition for writ of certiorari should be denied.

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